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# **THE HIERARCHY OF DIFFERING STANDARDS OF REVIEW IN LABOUR LAW: A CASE FOR LIMITED RE-ALIGNMENT?**

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## **The Hierarchy of Differing Behavioural Standards in Labour Law: A Case for Limited Re-alignment?**

### **Abstract**

This paper pursues a line of enquiry regarding employment laws which promulgate standards (rather than rules), the legitimacy of which is premised on the need to scrutinise managerial autonomy pursuant to a norm-setting, rather than norm-reflecting agenda. Insights will be offered in relation to the expectations about the exercise of the managerial prerogative which the law transmits through such standards. The argument is advanced that a by-product of the common law and statutory policy initiatives lying at the heart of the regulation of managerial autonomy has been the emergence of differing behavioural standards in the employment relationship. In order to satisfy the common law and statutory obligations which they owe towards their employees, employers are expected to discharge a variety of standards of conduct and adjudicators must apply differing standards of review in evaluating the lawfulness of managerial discretion. These differing standards can be grouped into a hierarchy, exploring how they function to exert a higher or lower level of scrutiny of the managerial prerogative. The paper proceeds to explore the rationales for the promulgation of such differing behavioural standards in different decision-making contexts. Finally, it goes on to analyse whether such differing standards are justifiable from a formalistic and doctrinal perspective and considers the practicability and desirability of a modest package of reform consisting of limited re-alignment whereby certain standards would be harmonised in similar contexts.

## 1. INTRODUCTION

The objective of this paper is to pursue a line of enquiry regarding employment rights which are promulgated as standards (rather than rules), the legitimacy of which is premised on the need to scrutinise managerial autonomy pursuant to a norm-setting, rather than norm-reflecting agenda. Insights will be offered in relation to the expectations about the exercise of the managerial prerogative which the law transmits through such standards. At the fulcrum of the standard-setting process lies a tension between the recognition of the necessity of freedom of action on the part of the commercial operation of the employer, while at the same time forging a balance which is reflective of the law's concern to police the potential for the exploitation of employees.

In this paper, the argument is advanced that a by-product of the common law and statutory initiatives lying at the heart of the regulation of managerial autonomy has been the emergence of differing behavioural standards of review in the employment relationship. The common law and statutory employment protection obligations which are imposed on employers entail that their decision making and general conduct be assessed by adjudicators in accordance with a variety of differing standards of review. Section 2 of this paper is essentially a descriptive undertaking whereby the differing standards present in the field of labour law are identified and then grouped into a hierarchy, exploring how they function to exert a higher or lower level of scrutiny of the managerial prerogative. Section 3 of the paper proceeds to explore the rationales for the promulgation of such differing behavioural standards in different decision-making contexts. The paper goes on to analyse whether such differing standards are justifiable from a formalistic<sup>1</sup> and doctrinal perspective and considers the practicability and desirability of a modest package of reform consisting of limited re-alignment whereby certain standards would be harmonised in similar contexts. Section 4 concludes.

## 2. THE EXISTENCE OF DIFFERING BEHAVIOURAL STANDARDS

### A. General

Employment rights which are expressed as rules can be distinguished from those which are set out as standards. A standard is more open textured and less precise than a rule amounting to a tangible differential in formal substantive terms.<sup>2</sup> Standards can be divided into standards of conduct and standards of review. Standards of conduct represent the law's method of erecting signposts about the nature of the behaviour expected of employers and are directed at employers. They represent standards against which employers may *internally* test their conduct and decision making. Meanwhile, standards of review are addressed to adjudicators and set the level at which the law expects independent adjudicators to scrutinise managerial action and decision making.<sup>3</sup> Thus, standards of review entail an evaluative process whereby the decision making and conduct of an employer is assessed *externally* by an independent adjudicator. The fundamental hypothesis posited by the author in another paper<sup>4</sup> was that the degree of scrutiny associated with a particular standard of review ought to inform our understanding of the importance which a system of labour law attaches to the fundamental values and policy considerations which underpin that employment right. In terms of a functionalist normative methodology<sup>5</sup> which posits that labour law can be understood and ought to be shaped in accordance with the objectives which it is designed to serve, it was argued that the common law or legislature ought to (and would appear to)<sup>6</sup> have regard to the strength of the values and policy factors which influence that particular employment right in fixing the intensity of the standard of review. Adopting the formulation of Allen, Jacobs and Strine,<sup>7</sup> the paper proffered the normative proposition that the standard of conduct and standard of review ought to deviate and/or an adjudicator would be justified in modifying the standard of review so that it is more forgiving or stringent than the former, as the case may be, where (i) important policy considerations or fundamental values justify such a divergence or modification or (ii) it is clear that (a) more

than one decision may be reasonable in response to a given set of circumstances or (b) it is difficult for adjudicators to differentiate between 'bad' decisions taken by the employer from 'good' decisions taken by an employer which turn out 'badly'. A normative framework was tentatively constructed against which that hypothesis could be given greater clarity and strength by adopting a reliable metric against which intensities of review could be charted. The metric adopted was to plot standards in terms of the level of interference which they internally (by the employer itself) or externally (by an adjudicator) exert over the managerial prerogative, that is, the degree to which managerial action is called to account internally or externally by that standard.

It should be clarified at this juncture that this paper is concerned with an examination of standards of review in labour law. That is to say that consideration will be given to the intensity of scrutiny attached to the standard of review in the context of differing employment rights from the perspective of the degree of interference which it wields over managerial autonomy—rather than the standard of conduct. It is submitted that there is little purpose in examining employment rights for different standards of conduct, since adjudicators will often be directed to apply standards of review which are set at a more deferential or stringent level of scrutiny. It is the standards of review which are more important, since these are the instruments which are applied by courts and tribunals to determine the liability of employers.

With this in mind, it is submitted that there are five principal standards of review of the exercise of the managerial prerogative in the context of labour law today. Those standards are essentially parasitic or accessory to a particular employment right. Depending on the right concerned, the employer's conduct may be judged according to (i) an irrationality standard which is close to (yet conceptually distinct from) (ii) a subjective standard, to others on the basis of (iii) a mixture of subjective and objective standards, to some based on (iv) an objective standard and to others on (v) a proportionality standard. Thus, in diverse contexts—and as will be explained—sometimes in the same context, adjudicators are

expected to apply, and employers' decisions are evaluated against diverse standards. The standards encountered by employers in the context of employment laws can be classified within a hierarchy with each set exerting greater or lesser control over the employer's freedom of autonomy. In this paper, these standards are charted from the least onerous to the most exacting on the employer in terms of the normative framework for measuring intensities of scrutiny discussed in the previous paper, that is, the extent of the intrusion into the managerial discretion of the employer.

## **B. 'Good Faith' and Irrationality Standards**

Three implied terms of the contract of employment which are concerned with imposing standards of 'good faith' on the behaviour of the parties are first the implied term of mutual trust and confidence, secondly the implied term that an employer's decision to award (or not award) discretionary bonuses or benefits must not be made irrationally, perversely or contrary to good faith ('the discretionary bonus/benefits implied term')<sup>8</sup> and finally the implied term that an employer will not dismiss an employee in order to avoid the making of guaranteed or conditional payments to the employee (the anti-avoidance implied term).<sup>9</sup> These implied terms have been used by the courts and tribunals to police and regulate the exercise of power and discretion by employers in a manner which is not dissimilar to the supervisory jurisdiction of the administrative courts.<sup>10</sup> But whilst each of these implied terms is both expressed in terms of good faith standards and function to control the exercise of discretionary powers on the part of the employer by effectively conferring employment rights in favour of employees, the behavioural expectations imposed on employers, whilst similar, are not quite aligned. For example, in *Clark v Nomura International plc*,<sup>11</sup> Burton J explained the nature of the 'irrationality/perversity/good faith' test which applies in the context of the discretionary bonus/benefits implied term. He located the applicable standard between a lenient test of 'capriciousness' which 'carr[ies] with it aspects of arbitrariness or domineeringness, or whimsicality and abstractedness'<sup>12</sup> and a more

stringent test of 'reasonableness' which would enable a tribunal or court to substitute its own view for that of the employer, that is, a purely 'objective reasonableness' test. Instead, the irrationality/perversity test requires an adjudicator 'to put [its]elf in the shoes of those making the decision'<sup>13</sup> and directs it towards an enquiry as to whether no rational employer would have exercised its discretion in the way that it did.<sup>14</sup> Speaking in the field of corporate law, as Eisenberg recognised, 'a decision that fails to satisfy the rationality standard is a decision that cannot be coherently explained'.<sup>15</sup> To that extent, the rationality standard entails an evaluative process which tends more towards the subjective than the objective. Thus, the standard of review in the case of the discretionary bonus/benefits implied term is loose and keeps the supervisory jurisdiction of the courts and tribunals within restricted bounds, circumscribing their scope of action, since it will only be in the most exceptional of cases that a ruling will be made against an employer.

The test for assessing the conduct or omissions of the employer in the context of the discretionary bonus/benefits implied term can be contrasted with the test which is applicable for the purposes of determining whether the implied term of mutual trust and confidence has been breached. In determining whether trust has been destroyed, seriously damaged or undermined by the conduct or omissions of an employer, the courts and tribunals adopt an objective test.<sup>16</sup> The distinction between a 'rationality' and 'objective' test is that in the case of the latter, an adjudicator has the power to override the judgment of the decision maker by freely applying its mind as to whether that person's actions, conduct or omissions were lawful or not. Thus, an adjudicator has the authority to substitute its own judgment for that of the decision maker, which occasions a more intensive evaluation of the employer's actions.<sup>17</sup> Whilst an objective test enables a court or tribunal to substitute its own judgment for that of the employer, in the case of the implied term of mutual trust and confidence, the objective test does not proceed on the basis of the extent to which the employer was 'reasonable'.<sup>18</sup> Such an approach, as will be explained below, is appropriate in the case of the employer's duty to exercise reasonable care for the welfare of the employee. Instead, it is only where an



employer's conduct on an objective assessment results in the destruction or severe undermining of trust and confidence that an adjudicator will rule that there has been a breach of the implied term of mutual trust and confidence. The objective component inherent within the implied term of mutual trust and confidence affords the courts and tribunals a wide berth for manoeuvre in calling the behaviour of the employer to account. Meanwhile, the test which an adjudicator must apply as a means of determining whether the anti-avoidance implied term has been breached is not altogether clear from the case law.<sup>19</sup>

What is clear is that the tests applicable in the case of each of the above three implied terms differ. The standard applicable in the case of the discretionary bonus/benefits implied term is much less stringent than that applicable in the case of the implied term of mutual trust and confidence. This is slightly odd, since both share many affinities as noted above. The rationales advanced by the judiciary for the formulation of the irrationality/perversity standard of review in the case of the discretionary bonus/benefits implied term are worthy of consideration at this stage.<sup>20</sup> One gains the impression from the case law that the courts and tribunals were particularly concerned to construct a standard which was deferential to the employer.<sup>21</sup> A standard of review based on reasonableness, namely 'without reasonable or sufficient grounds' was perceived to be too exacting a standard to expect an employer to discharge. Meanwhile, 'capriciousness' was too lax. But the precise reason why the courts and tribunals selected the test of rationality remains unexplained.

It may be useful to speculate on the policy considerations which may have influenced the judiciary in formulating such a standard of review given the absence of any candid explanation in the case law. As a matter of policy, it may be wise for the courts and tribunals to devise a scheme which defers to an employer in forging the level of payment or award made to an employee in the case of a discretionary bonus or benefit. This is based on informational asymmetries which exist between employer and adjudicator and reflect an implicit recognition that employers will understand their business and the commercial

environment within which they operate better than any court or tribunal. This includes the best practices (and industry practices) designed to motivate and incentivise staff through the fashioning of the bonus, benefits or remuneration packages. Another policy reason might be reflective of the interplay between what is of course definitionally a contractual discretion and the nature of the standard of review. That is to say that to fix the level at which an adjudicator must assess an employer's decision not to award a discretionary bonus/benefit (or to award a discretionary bonus/benefit at a particular amount) at too high a point might be seen as not too far away from the judiciary overriding the discretionary nature of the contractual bonus. If a contract provides that an employer's decision to award a bonus or benefit is discretionary, then to apply an objective standard of review might be objectionable in that it gives a court or tribunal a free hand to replace the employer's judgment with that of its own. This might be viewed as coming too close to comfort to the courts rewriting the work-wage bargain struck by the parties in the employment contract.<sup>22</sup> Thus, as a matter of policy, it may be advisable for the law to defer to the judgment of employers to a certain degree and fix a standard of review which is low, i.e. rationality.

### **C. Subjective Standard**

Where an employee presents a complaint of unfair dismissal to an employment tribunal, he/she must first establish that he/she has been dismissed in terms of section 95(1) of the Employment Rights Act 1996 (ERA). As will be explained below, the determination of the existence of a dismissal under section 95(1) is conducted on an objective basis. If that has been achieved, in terms of section 98(1)(a) of the ERA, the onus then shifts to the employer to demonstrate the reason (or, if more than one, the principal reason) for the dismissal. At this juncture, questions arise as to whether the determination of the employer's reason for dismissal is a matter of fact or a legal issue and if it is the latter, what standard of review the court or tribunal should apply to the employer's state of mind? First, the authorities establish that the employer's real reason for the employee's dismissal is one of law, rather than

fact.<sup>23</sup> That being the case, the enquiry is evaluative rather than factual and the attention turns to the appropriate standard of review. The wording of ERA does not directly address the point, but the authorities are clear that the tribunal and the court must look to discover what it was that *subjectively* motivated the employer: it is irrelevant that an objective intensity of scrutiny reveals that the subjective belief of the employer was in fact incorrect.<sup>24</sup> The adjudicator has no power to substitute its own judgment for that of the employer as to what the 'true' or 'real' reason may have been. This results in a somewhat lax intensity of review, which is significant as it may be that an employer has mislabelled the reason for the dismissal, for example by attributing the reason as redundancy when in fact it was misconduct. So long as the subjective belief of the employer is genuine, that is sufficient for the section 98(1) stage of an unfair dismissal claim to have been safely negotiated.

#### **D. The 'Range of Reasonable Responses' Standard**

From the standpoint of the degree of scrutiny exerted upon the managerial prerogative, the 'range of reasonable responses' standard of review is located somewhere above that of the 'irrationality/perversity' and 'subjective' tests. All three of these tests share in common the importation of a margin of discretion for manoeuvre in favour of the employer, duly involving elements of subjectivity. Like the 'irrationality/perversity' standard, the discretion afforded to the employer by the 'range' test is not absolute. However, the latter curtails the managerial autonomy to a greater degree than the former, since it incorporates certain objective factors into its application.

The most notorious area of labour law in which the 'range' or 'band' test is encountered is in the context of the determination of the reasonableness of a dismissal of an employee in terms of section 98(4) of the ERA for the purposes of the statutory concept of unfair dismissal.<sup>25</sup> The range of reasonable responses formulation denies an adjudicator a free hand to substitute its own judgment for that of the employer.<sup>26</sup> Instead, a tribunal is enjoined to ascertain the band of responses which a reasonable employer might take in face of the

particular actions or omissions of an employee. This part of the assessment implicitly imports elements of objectivity into proceedings. However, as noted above, it is not confined to the application of objective criteria since it amounts to a sophisticated amalgam of objective *and* subjective considerations.<sup>27</sup> The subjective element is divisible into two components. First, in a 'weak' sense inasmuch as section 98(4) ERA specifically directs an adjudicator to take into account subjective criteria, such as the size and administrative resources of the employer and secondly, in a 'strong' sense to the extent that there is clearly scope for the employer to subjectively set the parameters of the adjudicator's enquiry by adopting internal practices and formal, written procedures and policies which underscore the particular economic interests of the organisation.<sup>28</sup>

The range test has been criticised in the Employment Appeal Tribunal<sup>29</sup> and by academic commentators,<sup>30</sup> and referred to by the European Court of Human Rights<sup>31</sup> as a form of a 'perversity' test not dissimilar to the irrationality/perversity standard in the context of the discretionary bonus/benefits implied term.<sup>32</sup> However, it is objectively demonstrable that there is a distinction between the two, albeit subtle.<sup>33</sup> Rather than a court or tribunal being directed to make an enquiry as to whether no reasonable employer would have dismissed the employee in the circumstances of the case (which would be a difficult burden for an employee to discharge), the court or tribunal must identify a band or range of responses which a reasonable employer would take. If the decision or action taken, or sanction adopted, by the employer does not feature on the list of reasonable responses identified by the court or tribunal, the adjudicator must rule that such decision or action was unreasonable. By emphasising what is reasonable rather than what is unreasonable, the focus of the 'range' test is drawn in positive, rather than negative terms and so is different. This leads towards the point of demarcation between what is reasonable and unreasonable being fixed at a different spot than if the question found its expression in terms of unreasonableness or irrationality.<sup>34</sup> Since the outcome of the application of the two standards is that the line between what is reasonable and unreasonable is drawn at different

places, it makes no sense to argue that they are conflated. If the standards were the same and simply expressions of the same approach, there would be no difference in the demarcation point.<sup>35</sup>

Confined at one time to the question of the fairness of a dismissal for the purposes of section 98(4) ERA, the range of reasonable responses test has branched out, leap-frogging over to fresh terrain in the past decade or so. Thus, a particular version of the range of reasonable responses standard was also applicable in the context of the justification defence in the case of 'disability-related discrimination' in section 3A(1) of the Disability Discrimination Act 1995 (DDA). Although the statutory concept of 'disability-related discrimination' in section 3A(1) of the DDA was repealed when section 15 of the Equality Act 2010 (EA) came into force on 1 October 2010, it must be stressed that it is of import for the analysis in this paper.<sup>36</sup> Section 3A(1)(b) of the DDA enabled an employer to justify the less favourable treatment of a disabled person for a reason related to his/her disability provided that the justification was 'both material to the circumstances of the particular case and substantial'.<sup>37</sup> In *Jones v Post Office*,<sup>38</sup> the Court of Appeal held that a tribunal should consider whether the reason advanced by the employer for the treatment of the disabled person fell within the range of what a reasonable employer would have relied on as a material and substantial reason for the less favourable treatment. Thus, a tribunal was not entitled to enquire whether the employer's reason for the disability-related discrimination was material and substantial and then substitute its own judgment for that of the employer if it disagreed, since that would have involved the application of a purely objective standard of scrutiny.<sup>39</sup> Instead, the tribunal was required to 'make a list' of the reasons which reasonable employers would consider to be material and substantial for the less favourable treatment. If the reason advanced by the employer for the less favourable treatment in a particular case was not included on the tribunal's list, the employer would have failed to satisfy the section 3A(1)(b) DDA defence.

In the same context of disability discrimination, an employer owes a disabled employee a duty to make reasonable adjustments where the application of a provision, criterion or practice (PCP) or a physical feature of the employer's premises puts that employee at a substantial disadvantage in comparison with persons who are not disabled. The relevant statutory provisions are sections 20–2 of the EqA 2010 and were formerly set out in sections 3A(2), 4A and 18B of the DDA which are now repealed. The standard of review in ascertaining whether the employer has breached the duty to make reasonable adjustments is one of objective reasonableness.<sup>40</sup> The objective test legitimizes an adjudicator to undertake a wide scope of enquiry.

Therefore, prior to the coming into force of the relevant provisions of the EqA on 1 October 2010,<sup>41</sup> as regards the protected characteristic of *disability* discrimination, in the case of the concept of disability-related discrimination under section 3A(1) of the DDA, the employer's conduct was assessed by reference to a 'range of material and substantial reasons' standard. This can be contrasted with the s. 3A(2) DDA duty to make reasonable adjustments, whereby an 'objective reasonableness' standard was applied by the tribunal.<sup>42</sup> The former entailed a more forgiving evaluation of the employer's conduct, whereas the latter empowered an adjudicator to take a more interventionist approach. The temptation is to proclaim that the presence of differing standards in the context of the DDA rendered the law incoherent, since whether a disabled claimant who had suffered from prejudicial and discriminatory conduct at the hands of his/her employer obtained relief would depend on how the tribunal claim was framed, that is, as a section 3A(1) DDA or section 3A(2) DDA claim. However, the temptation to proclaim the law as incoherent should be resisted on the basis that it proceeds on too simplistic an analysis. There are two reasons for such a position. First, an employer was disempowered from pleading a justification defence in terms of disability-related discrimination under section 3A(1)(b) DDA unless it had satisfied its duty to make reasonable adjustments in terms of section 3A(2) DDA. That is to say, the tribunal or court was required to determine first whether the employer owed the employee a

duty to make adjustments, what the content of any such duty would have been in the circumstances and what the position would have been if the employer had fulfilled any such duty that was incumbent on it.<sup>43</sup> This is important, since it meant that the range of material and substantial reasons test associated with the employer's justification defence in section 3A(1)(b) DDA would be postponed to the objective standard connected to the section 3A(2) DDA duty to make reasonable adjustments: only if the latter objective test was satisfied would engagement with the range of material and substantial reasons standard be required. Hence, in a number of cases, there was no need to consider the 'range' test.

Secondly, in the case of *Heathrow Express Operating Co. Ltd v Jenkins*,<sup>44</sup> Elias J (as he then was) opined that there was a 'perfectly comprehensible rationale' for the difference in the tests.<sup>45</sup> The divergence could be explained by invoking the separate and differing implications of the application of section 3A(1) and (2) DDA on the employer's arrangements in running its commercial operation. The justification test in the context of disability-related discrimination operated at the more lenient range of material and substantial reasons standard in order to respect the prerogative afforded to management in choosing how to organise its business practices. Here, there was an implicit recognition in the law that there may be good commercial or other reasons for an employer to apply a commercial function or practice which nevertheless inadvertently resulted in a person who was disabled suffering less favourable treatment on the basis of a reason related to that person's disability. It is submitted that the effect of the *Jones v Post Office* approach to section 3A(1) and (3) DDA was to ensure that the concept of 'disability-related' discrimination in section 3A(1) DDA was not concerned about changing the employer's commercial operations but with assessing the weight of the rationales for certain practices which resulted in less favourable treatment by reference to a 'material and substantial' criterion. Meanwhile, the objective nature of the test applicable in the case of the duty to make reasonable adjustment in section 3A(2) DDA recognised that the legitimate arrangements designed by the employer may nonetheless result in a disabled employee suffering a substantial disadvantage. Here, the statutory

wording enjoined a tribunal to take a more interventionist approach by transmitting a clear signal that the employer's commercial practices required to be modified to comply with the law. Elias J's exposition of the rationale for the distinction in the tests recognised the far-reaching scope of the employer's section 3A(2) DDA duty to make reasonable adjustments when compared with the employer's section 3A(1) DDA duty. That is to say that the former entailed an element of positive discrimination in favour of the disabled employee and a departure from the employer's general business practices, whereas the latter did not.<sup>46</sup>

Nevertheless, despite Elias J's insightful contribution towards our understanding of the rationales for these differing standards in the case of the DDA, academic and judicial commentators expressed criticism or misgivings regarding the desirability of applying a variant of the range of reasonable responses standard to the employer's justification defence in section 3A(1) of the DDA. First, Davies argued that the range of reasonable responses standard of review was conceptually misplaced since it fails to direct employers to alter their existing behaviour.<sup>47</sup> Furthermore, in the case of *O'Hanlon v Revenue and Customs Commissioners*,<sup>48</sup> Sedley LJ expressed reservations regarding the suitability of the range test adopted by the Court of Appeal in *Jones*.<sup>49</sup> One might also speculate that such reservations filtered down to the policy level, since section 15 of the EqA which repealed the concept of 'disability-related discrimination' and introduced the notion of 'discrimination arising from disability' replaces the range test with a proportionality test.<sup>50</sup> The proportionality test amounts to an objective justification approach which is more questioning of the employer's conduct and so, in comparison with the *Jones v Post Office* approach to section 3A(1) and (3) DDA, section 15(1)(b) of the EqA will serve to curtail the margin of discretion afforded to employers.

Therefore, there is clear evidence of the movement of the range test beyond its original habitat of unfair dismissal. However, the story of legal migration and transplantation has not been one of uniform wholesale success. For example, an attempt to apply a variation of the



range of reasonable responses test in the context of the employer's proportionality defence applicable in a case of indirect sex discrimination (as governed by section 1(2)(b)(iii) of the Sex Discrimination Act and now by section 19(2)(d) of the EqA) was rejected by Pill LJ in the case of *Hardy & Hansons plc v Lax*.<sup>51</sup> Pill LJ was of the view that in undertaking a review based on a proportionality criterion, an adjudicator is invited to form 'its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary'.<sup>52</sup> Moreover, there was a short-lived period in which the range of reasonable responses standard was deployed for the purposes of ascertaining whether an employee had been constructively dismissed in terms of section 95(1)(c) ERA on the basis of a breach of the implied term of mutual trust and confidence.<sup>53</sup> In the case of *Buckland v Bournemouth University Higher Education Corp*,<sup>54</sup> Sedley LJ in the Court of Appeal rejected this approach and directed employment tribunals and courts to enquire whether an employee had been constructively dismissed in accordance with an objective standard of review, rather than a range of reasonable responses test.<sup>55</sup>

What have been the motives or rationales for the materialisation of the interpretative technique of the 'range of reasonable standard' adopted by the judiciary towards section 98(4) of the ERA? As remarked by Collins, the reasons for the adoption of such a test have not been clearly articulated by the judiciary.<sup>56</sup> It is submitted that a revealing exposition of the rationales for the emergence of the range standard can be secured in terms of an appreciation of the justifications for a distinction between the standard of conduct expected of the employer and the standard of review which must be applied by an adjudicator. There are two reasons for a divergence in the intensity of managerial scrutiny attached to the standard of conduct and the standard of review in the context of section 98(4) of the ERA, with the latter drawn at a more exacting level than the former, namely (i) 'practical fairness' and (ii) policy choices. The notion of (i) 'practical fairness' recognises that divergence is justified on the ground that more than one decision by the employer may be appropriate when responding to difficult circumstances or where serious challenges confront

adjudicators in distinguishing between inherently misconceived decisions taken by an employer from 'good' decisions taken by an employer which simply turn out 'badly'.<sup>57</sup> Meanwhile, (ii) above represents the idea that pursuing legitimate policy preferences or reflecting substantive policy considerations may present a suitable rationale for divorcing the standard of conduct from the standard of review.<sup>58</sup>

This links in with the three particular explanations expressed in utilitarian or instrumental terms which Anderman has identified.<sup>59</sup> The first explanation invokes the judicial reluctance towards the second guessing of managerial decisions. Elias has echoed this point by reformulating it in terms to the effect that the judiciary are less comfortable with engaging in a review of the substance of managerial decisions than they are with scrutinising the procedures applied by the employer in reaching such decisions.<sup>60</sup> This represents a deep-seated policy choice on the part of the judiciary. Secondly, the application of the standard can be perceived as a means of avoiding an over-intrusive approach to adjudication which might otherwise dissipate valuable, limited resources. Finally, the standard represents a compromise between managerial efficiency or autonomy and the protection of employees. Collins has also offered other explanations, such as the judiciary being keen to avoid a negative view of the legitimacy of their role, a judicial response to the 'floodgates' argument<sup>61</sup> and a conception of justice in dismissal articulated in terms of intervention duly restricted to circumstances where the actions of employees have not resulted in harm to the employer's legitimate commercial interests.<sup>62</sup> Indeed, in the view of Collins, the 'range test' does not actually set standards, but instead sets boundaries and is norm reflecting, rather than norm setting.<sup>63</sup> He argues that a more fitting conception of justice in dismissal in terms of the statutory test of unfair dismissal would be captured by a test expressed in terms of a proportionality standard.<sup>64</sup> Although the judiciary categorised the range of reasonable responses test as more or less the same thing as a proportionality standard in the cases of *X v Y*<sup>65</sup> and *Pay v Lancashire Probation Service*,<sup>66</sup> it is submitted that the European Court of Human Rights in *Pay v UK*<sup>67</sup> rightly took the view that they were conceptually distinct.<sup>68</sup>

## E. Objective Standards

In the field of labour law, an objective standard is applied in a number of particular contexts. First, an objective test is harnessed as a means of ascertaining whether an employer has breached the implied term of the contract of employment which enjoins it to exercise reasonable care for the physical and psychiatric welfare of its employees. The standard of care associated with the implied duty of care is whether the employer acted reasonably and prudently, objectively construed.<sup>69</sup> Such an objective reasonableness standard directs an adjudicator towards an enquiry of what a reasonable person would have done in the factual circumstances, taking into account in particular the foreseeability of harm, the magnitude of the risk of that harm occurring, the gravity of the potential harm, the cost and practicability of preventing it and the justifications for running the risk. If the adjudicator rules that the reasonable person on an objective assessment would have acted in a manner, or taken steps, which the employer failed to take, the employer will be deemed to be in breach of duty.

Secondly, whether an employer (or employee for that matter) has breached the implied term of mutual trust and confidence is also assessed by reference to an objective standard. The adjudicator's task is channelled towards an analysis of the impact of the employer's conduct on the employee and the objective nature of the enquiry enables a court or tribunal to substitute its own judgment for that of the employer. If the adjudicator is of the view that the actions or decisions of the employer have, without reasonable and proper cause, destroyed or seriously damaged the trust and confidence inherent in the employment relationship, the employer will be held to be in breach regardless of its motive or subjective intentions.<sup>70</sup>

Thirdly, sections 20–22 of the EqA<sup>71</sup> provide that an employer has a statutory duty to make 'reasonable' adjustments to the workplace (premises or provisions, criteria and practices applied by the employer) to accommodate its disabled employees. In terms of *Collins v Royal National Theatre Board Ltd*<sup>72</sup> and the judgment of Kay LJ in *Smith v Churchills*

*Stairlifts plc*,<sup>73</sup> the judiciary have drawn the standard of review in terms of an 'objective reasonableness' standard. This affords a wide berth to an adjudicator to investigate and intervene. Fourth, in ascertaining whether an employee has been dismissed in terms of section 95(1) of the ERA, the tribunals and courts must apply an objective approach.<sup>74</sup> Finally, the judgment of Mummery LJ in *London Ambulance Service NHS Trust v Small*<sup>75</sup> is suggestive of the application of an objective test in determining whether there is conduct on the part of the employee which establishes contributory fault in an unfair dismissal case, that is, that he/she contributed to his/her own dismissal. Mummery LJ made a distinction between the adjudicator's review of the employer's decision to dismiss (which attracts the range of reasonable responses standard and is determinative of employer liability) and the intensity of review to be adopted in determining the extent of the employee's contributory fault. In the context of the latter, it is incumbent on an adjudicator to take into account the full range of facts and to form its own view, that is, to apply its own judgment. However, Mummery LJ ruled that this is not an approach open to the adjudicator in ascertaining the reasonableness of the dismissal itself.<sup>76</sup>

This leads to an important question. That is to say, what have been the motives for the materialisation of such standards of review? First, in the context of an enquiry as to whether the employer has discharged the standard of care for the purposes of the implied contractual duty of care, the rationale for the objective nature of the standard is predicated on the need to ensure fair and consistent decisions. Moreover, law and economics scholars have argued that the 'information cost of determining each [employer's] intelligence and ability to make judgments of this sort would be too great to justify departing from the reasonable-man standard'.<sup>77</sup> Secondly, as for the scrutiny of the conduct of the employer in the case of the implied term of mutual trust and confidence, one might conjecture that the objective test is also based on a desirability to avoid inconsistent decisions in the law. If the presence of a breach of the implied term of mutual trust depended on the subjective intentions or motives of employers, then the same conduct in different cases would result in different outcomes.

Moreover, in *Malik v BCCI*,<sup>78</sup> Lord Steyn endorsed the objective approach with the rationale that it reflected 'classic contract law principles'.<sup>79</sup> One might also hypothesise that an indirect influencing factor on the emergence of a wider scope of review (in the guise of the objective test) in the case of implied term of mutual trust and confidence has been a recognition by the judiciary that de-unionisation, de-collectivisation, privatisation and the growth in globalisation over the past 30 years or so have resulted in lower job security for workers and a concomitant increase in their vulnerability.<sup>80</sup>

Turning to the rationale for the applicability of an objective standard in the case law which determines whether an employee has been dismissed under section 95(1) of the ERA for the purposes of the statutory unfair dismissal regime, this can perhaps be attributed to the somewhat beguiling capacity of the tribunals and courts to cling to approaches and concepts inherent within the common law of the contract of employment. The process adopted by the tribunals and courts reveals that they have construed section 95(1) of the ERA in accordance with the traditional language of contract law as a means of fashioning its normative content rather than treating the statute as an autonomous self-contained body of regulation. In terms of the common law which regulates the termination of the contract of employment, an objective approach has traditionally been applied. Since the language of section 95(1) of the ERA includes terms such as 'termination' and 'contract', the tribunals and courts have resorted to the objective approach with which they are familiar.<sup>81</sup> The rationale for the existence of an objective standard in the context of the assessment of contributory fault in an unfair dismissal case, that is, whether the employee contributed to his/her own dismissal, is similar to that which applies in the case of section 95(1) of the ERA. It relies on the objective common law approach to the evaluation of an individual's contributory fault in the law of tort and delict. Finally, with regard to the reasonable adjustments duty of an employer in the case of sections 20–22 of the EqA, the reasoning for the objective nature of the standard has been explained above. That is to say that the objective nature of the duty is desirable since the duty is concerned with changing the

commercial practices of the employer where their effect is to substantially disadvantage disabled employees, enjoining positive discrimination in their favour.

## **F. The Proportionality Standard**

‘Proportionality’ is another standard which is applied to judge the conduct, actions or decisions of employers in the context of the employment relationship. It is encountered in the field of discrimination law which prohibits indirect discrimination on the basis of sex, race, religion, belief, gender reassignment, marriage, civil partnership, sexual orientation and age. The test directs an adjudicator to enquire whether the application of a provision, criterion or practice (‘PCP’) by an employer amounts to a ‘proportionate means of achieving a legitimate aim’.<sup>82</sup> Thus, it is applied as a form of managerial defence to a PCP which is *prima facie* (i) indirectly discriminatory, (ii) directly age discriminatory or (iii) discriminatory in consequence of an employee’s disability. The proportionality standard implements EU law and in particular the text of Articles 2(1)(b), 2(2)(b) and 2(2)(b)(i) of the Recast Equal Treatment Directive,<sup>83</sup> the Racial Discrimination Directive<sup>84</sup> and the Framework Directive.<sup>85</sup> The actual text of each of the aforementioned Directives and the interpretation of the proportionality standard in *Bilka-Kaufhaus v Weber von Hartz*<sup>86</sup> and *Enderby v Frenchay Health Authority*<sup>87</sup> impose a requirement on the tribunal or court to ascertain whether the means of achieving a real need on the part of the employer (that is, the legitimate aim) is ‘appropriate and necessary’. This is known as the ‘least restrictive means’ approach to proportionality and represents a slightly different emphasis than the UK ‘proportionate means’ formulation. It breaks down into a three-stage approach which requires the adjudicator to undertake a critical evaluation of first the business needs of the employer which is essentially an objective pursuit in nature,<sup>88</sup> and secondly whether the application of the PCP is appropriate and finally whether it is necessary. If the application of the PCP is not necessary to achieve the real need, the proportionality standard is not satisfied. Thus, it is difficult for an employer to discharge the ‘least restrictive means’ form of the proportionality standard. Bamforth,

Malik and Cinneide have commented that 'there is concern that the domestic legislation makes use of a weaker formula',<sup>89</sup> imposing a less rigorous standard of review. This is based on the *Barry v Midland Bank*<sup>90</sup> formulation which is applied domestically and adopts a standard of review which is variable in its intensity and entails balancing the discriminatory impact or harm suffered by the employee against the employer's need to achieve a legitimate aim. The greater the harm suffered by the employee, the greater the employer's need must be. However, like the 'least restrictive means' approach, the balancing method adopted in *Midland Bank* also enjoins an adjudicator to approach its task on an objective basis.

Although the proportionality standard is objective in nature, in its operation in practice it is slightly different from a purely objective standard. First, the proportionality test possesses the attractive feature of divorcing the adjudicator's review from the requirement to make comparisons with other 'proportionate' employers which in certain circumstances may be inappropriate. Furthermore, traditionally understood, proportionality does not involve the courts substituting their own judgment on the merits of a case for that of the employer (as the primary decision-maker).<sup>91</sup> Moreover, there is an argument that a proportionality standard demands a more reasoned justification from employers for the treatment afforded to their employees. Hence, the factual bases which guided their actions must be ventilated before an adjudicator, imposing a more intrusive level of judicial activism than a purely objective standard.<sup>92</sup> Another difference from the objective standard of review is that the proportionality standard involves the application of a variable intensity of review depending on the nature of the prohibited ground of discrimination and the consequences of the discriminatory treatment.<sup>93</sup> For example, in certain instances of discriminatory treatment, the level of review incorporates an appreciable margin of deference whereas in others, the intervention of the court or tribunal is much more intense. This variability feature can be contradistinguished from the objective standard of review where the notion of a variable degree of scrutiny of managerial action in differing contexts has been expressly rejected by

the judiciary.<sup>94</sup> Finally, proportionality can also be contrasted with the range of reasonable responses standard, in the sense that the latter is norm reflecting rather than norm setting. Further, the latter is generally one-dimensional in nature since it concentrates on the actions of the employer only,<sup>95</sup> whereas the former is two-dimensional, focussing on the actions and needs of the employer and the harm caused to the employee, duly balancing them off against each other.

The rationale for the introduction of the proportionality standard is linked to the principle of liberal democracy and on a more general note it espouses the notion that 'regulatory intervention must be suitable to achieve its aims',<sup>96</sup> whether the source of such intervention is a public body, such as a local authority or Government department, or indeed a private employer. Another rationale for the emergence of the proportionality standard is immersed in its connection 'to the principle of respect for fundamental rights'.<sup>97</sup> Indeed, in the employment law context where one encounters the proportionality standard, it is indelibly linked to the fundamental principle of equal treatment and equality of opportunity. Particularised to the law of equal treatment in the context of employment, underpinning the proportionality standard lies a recognition that there may be an objective factor unrelated to a prohibited ground of discrimination which supplies explanatory force for the treatment afforded to an employee which is not only suitable but also necessary to achieve that objective purpose.

### **3. A HIERARCHY OF BEHAVIOURAL STANDARDS**

#### **A. Introduction**

At the beginning of this paper, the view was expressed that the standards of review which adjudicators are expected to apply can be classified within a hierarchy and charted across a spectrum. A normative framework for the measurement of intensities of review can be erected which is predicated on the notion of the level of interference which they exert over



managerial autonomy. In terms of this framework or metric, the five standards of review which have been discussed in this paper will be mapped across a spectrum from the most interfering to the least exacting on the employer, with the relative intensities of review being plotted in terms of 'weak' to 'strong' intervention. In this vein, one can think of a hierarchy of standards with proportionality exercising the most constraint on the employer, closely followed by the objectivity standard, with the range of reasonable responses test resting somewhere near the middle, closely followed by the subjective standard of scrutiny, with the irrationality/perversity test exerting the least interference over the employer's prerogative powers at the bottom of the range. See Figure 1 for further details. Table 1 labels the relative rights against the standards of review.

In formulating such figures, one must recall that the nature of the review in the case of the standards themselves is not always linear. There are a variety of reasons for articulating this caveat. First, the proportionality test is not exactly uniform in its application, since the degree of scrutiny of the primary decision maker which is associated with the standard varies in intensity and whilst it does not empower adjudicators to impose their own judgment over employers, it does invite them to engage in a more intrusive review of the employer's practices than that of the range and the irrationality standards. Secondly, in some cases, like is not being compared with like, since the range and proportionality tests entail fluctuating intensities of review, whilst the irrationality and objective standards do not, since they are fixed. The level of interference in the employer's prerogative powers brought to bear by the range test is context dependent, varying in accordance with the weight attached to certain objective and subjective considerations.<sup>98</sup> Similarly, the degree of intrusion associated with the proportionality standard is protean and depends on the relative strength of the legitimate aims of an employer and the concomitant harm sustained by an employee. This can be contrasted with fixed standards such as the rationality, subjective and objective approaches where the notion of a fluctuating, case-specific intensity of scrutiny is unsound. Nevertheless, it is submitted that this does not detract from the underlying contention that

the intrinsic nature of the standards can be charted in terms of a hierarchy at a more general level of analysis.

## **B. Disadvantages**

The principal difficulty with an autonomous body of law such as labour law possessing different standards in the context of different employment rights is that the facts of cases cannot be put into neat pockets in the same way as the rights and the standards. In practice, when an employee presents a complaint to an employment tribunal, or initiates a common law action before a court, that complaint or action may well entail a claim for breach or infringement of a right which attracts a weaker standard of review alongside a claim for breach or infringement of a right which is based on a stronger standard. A good example would be the situation where a disabled employee claims unfair dismissal (a section 98(4) ERA complaint) and a breach of the duty to make reasonable adjustments (a section 20 EqA complaint) in the same case. The fairness of the dismissal in terms of section 98(4) of the ERA will be judged according to the range of reasonable responses standard, but the duty to make reasonable adjustments on the same set of facts will be examined on a purely objective basis. As a practitioner acting for an employee, given the laxity associated with the range test, the temptation may present itself to pursue the EqA claim with more vigour given the comparative strength of scrutiny of the objective standard and the availability of uncapped compensation in the case of the disability discrimination claim.

Moreover, rather confusingly, complaints or actions based on a claim for breach of certain rights in the same employment context sometimes attract different standards and there are also circumstances where the law prescribes that specific employment rights themselves will involve more than one stage of analysis with a particular standard applied at one stage and then a differing standard at a later stage. On the latter point, the statutory employment right not to be unfairly dismissed is the paradigm. The establishment of the dismissal, the reason for the dismissal and the fairness of the dismissal are approached on a sequential basis, but

are evaluated completely differently. For example, first, whether the employee has been dismissed in terms of section 95(1) of the ERA will be assessed pursuant to an objective standard, whereupon the evaluation of the employer's reason for that dismissal under section 98(1), (2), (2A), (3) or (3A) of the ERA will proceed on the basis of a subjective test and finally, the fairness of the dismissal in terms of section 98(4) of the ERA will be judged according to the range of reasonable responses standard. Finally, it is possible for circumstances to exist where an employee or employer might have been more successful if their case had been brought on the basis of an alternative head of claim which imposes a less forgiving standard of review on the employer. For example, an employee who was unsuccessful in his claim that his employer's failure to pay a discretionary bonus was irrational may have been better off by claiming that the failure to pay the bonus amounted to a breach of the implied term of mutual trust and confidence—which would be assessed on purely objective criteria.

The current balance in labour law which is forged between the power of management and the labour force is also open to the charge that the presence of diverse standards operates to increase transaction costs, which are externalised by employers by passage on to employees and consumers of their products and services. One might argue that the presence of differing behavioural expectations sends mixed signals to employers about the level of expectation which the law has regarding their conduct, actions and decisions in the workplace. How the standards are applied, and accordingly, the strength of the scrutiny exerted by an adjudicator over the decision making of an employer, are dependent on how the evidence and the facts are presented—which is a particularly arbitrary way to decide how the law ought to operate. Given the complexity of the legal position, external professional advice is crucial to enable employers to understand and apply the law correctly. Moreover, from the viewpoint of adjudicators, diverse standards of review impose adverse mental gymnastics which raises concerns about the legitimacy of their role and the soundness of their decisions. The recent quartet of cases in *Abbey National v*

*Fairbrother*,<sup>99</sup> *Barratt v Accrington and Rossendale College*,<sup>100</sup> *Claridge v Daler Rowney Ltd.*<sup>101</sup> and *Buckland v Bournemouth University Higher Education Corp.*<sup>102</sup> which debated whether it was doctrinally sound and generally appropriate for the range of reasonable responses test to be deployed for the purpose of determining whether an employee has been constructively dismissed under section 95(1)(c) of the ERA, are testament to the difficulties which can arise. The costs and degree of litigation may increase since there is greater opportunity for appeals to be made on the basis that the tests have been applied incorrectly by lower courts or tribunals. Considering this factor from the viewpoint of the employee, one might argue that the current balance indirectly leads to less job security since increased costs and the inability to plan smoothly will deter employers from hiring further staff.

Thus, from a formalistic perspective of labour law, that is, a perspective which treats labour law as an autonomous discipline which strives towards its own internal intelligibility in the mould of the arguments advanced by Weinrib (which are applied towards private law as a legal institution and discrete areas of private law), the perception is that the law lacks coherency. That is to say that the normative connections which the presence of diverse standards articulate between the various components of labour law are such that 'the incremental transformation or reinterpretation or even ... repudiation of specific decisions [is necessary] so as to make them conform to a wider pattern of coherence'.<sup>103</sup> The sense in which the word coherence' is used here differs from 'consistency'. As MacCormick has persuasively argued, consistency is satisfied if a grouping of rules or standards do not contradict each other. However, although such a grouping may be non-contradictory, they will be 'incoherent' if, as 'a set of propositions ... taken together, [they do not] make sense in [their] entirety'.<sup>104</sup> Thus, the overall thrust of the formalistic objection is that the standards of review ought to be reformed in order that there is a better degree of coherency and consistency in the field of labour law.

### **C. Justifications**

There is a temptation from a formalist perspective to express the view that the law is inefficient and incoherent and in need of wholesale reform for the reasons advanced above. However, if one is seeking to reflect the importance of an employment right on grounds of policy or from the perspective of constitutional or human rights or the recognition of fundamental values, it may be logical and valid to establish differing behavioural standards in the same or broadly similar contexts. Hence, the counter argument based on a functionalist analysis of labour law—that is, a philosophy which posits that a body of law can only be properly understood in light of non-legal disciplines such as economics, political theory, etc.—is that differing contexts demand differing standards. In the absence of differing standards, there would be insufficient particularity which is not an efficient economic policy goal.<sup>105</sup> Moreover, objectivity is only really appropriate where there is only one or very few appropriate or acceptable decisions which can be taken by management when faced with certain events. One might also adopt the position that divergences in legal standards represent a form of balancing mechanism in response to the prevalence of Governmental policy preferences in favour of fostering managerial adaptability, flexibility and ‘light touch’ regulation.<sup>106</sup> In other words, that in return for Governmental support for the flexibilisation of the workplace and limited regulation of the labour market over the past 30 years or so, employers must be expected to handle differing standards of review in the context of different—and sometimes the same—employment rights.

The intensities of scrutiny associated with the differing standards of review also enable us to understand the relative significance of various employment rights. There is a clear correlation between the intensity of scrutiny associated with a standard of review and the employment right to which that standard is attached. That is to say that the greater the deference to the employer associated with the selected standard of review, the less important the law would appear to treat the right and the latent values which influence its

content and scope of application. This is a crucial point, since it ensures that the degree of scrutiny of managerial discretion brought to bear by an adjudicator in the context of an employment right is pitched at a level which recognises fundamental precepts and the collective goals of the community. On this basis, equipped with the benefit of Table 1, employment rights can be charted in terms of a hierarchy of significance which is set out in Figure 2.

#### **D. A Case for Limited Re-alignment?**

In advance of any general consideration of the necessity of any programme of reform of standards of review in labour law, it is submitted that there is a *prima facie* case for some limited re-alignment of standards in similar and identical employment contexts. As the author has argued elsewhere,<sup>107</sup> the normative content of the discretionary bonus/benefits implied term and the anti-avoidance implied term ought to be re-conceptualised. It is submitted that such a rationalisation ought to be conducted within the framework of the implied term of mutual trust and confidence, which is also an implied term steeped in the 'good faith' regulation of discretionary powers. Thus, in determining whether an employer's decision not to award a bonus (or pitch a bonus at a particular financial level) is unlawful, the applicable standard ought to be objective in nature. Likewise, in the case of an adjudicator's enquiry under the rubric of the anti-avoidance implied term, an objective test should be applied. In terms of such a framework, an objective standard would be applied in order to test whether the employer has dismissed an employee in order to avoid the making of guaranteed or conditional payments to the employee. As has been noted elsewhere, it is objectionable for varying standards to be deployed 'within a single type of case having a single common topic',<sup>108</sup> namely the implied terms based on good faith and the law governing the content and nature of the implied term of mutual trust and confidence.

As for the broader assertion that labour law as an autonomous body of law displays a lack of coherence by virtue of the existence of differing behavioural standards in the same contexts

and differing contexts, on balance, it is submitted that there is considerable merit in such a view notwithstanding the validity of the justifications explored above. Therefore, one could envisage merit in undertaking a full-scale process of simplification and re-alignment. This is fortified by the fact that adjudicators seem to take diametrically opposed views of what level of scrutiny a standard of review entails or sometimes conflate two of them together.<sup>109</sup> To recap, from a formalist perspective, the argument has been advanced that the recalibration of standards of review is required in order to build a more rational body of labour law. Secondly, labour law is open to the charge that it is confusing and costly for employers and adjudicators to apply. For these reasons, a comprehensive simplification is attractive and one means of rationalising the standards of review would be in accordance with a preferred policy perspective, yet to be identified. However, a note of caution ought to be struck. Whilst there is indeed force in such arguments, rather than accede to calls that law reform is crucial, it is perhaps more compelling to investigate and establish how the law and the concomitant standards are actually being applied in legal practice before one rushes to judgment. This would involve undertaking empirical research to ascertain how practising lawyers approach and apply the standards of review which attach to employment rights. The emphasis would be on the legal processes and strategies which are deployed by employees, employers and their respective legal advisers in dealing with (i) disputes and/or (ii) initiated legal complaints or actions based on particular employment rights. By identifying the approaches of the main protagonists and their advisers to disputes arising inside and outside the tribunals and courts, it is submitted that a well-balanced picture of how standards are being applied will emerge. In particular, such empirical research would reveal how standards of review are understood by legal practitioners and the constraints under which they and their employer clients perceive themselves to be labouring.

As to the methodology of the research, one could envisage value in undertaking empirical research which focuses on interviews with the legal advisers of employees and employers. However, in undertaking such an analysis, from a theoretical perspective, the writer is alive

to the necessity of avoiding the inevitability of a binary conclusion, i.e. that employees, employers and legal practitioners either *do* or *do not* perceive themselves to be operating under constraints as a consequence of the presence of the hierarchy of diverse standards. Instead, the writer's objective is to keep open the possibility of the emergence of more nuanced conclusions which may signpost the way to alternative directions in which future research may proceed.

#### **4. CONCLUSIONS**

In this paper, the writer has sought to place a spotlight on the differing standards of review in labour law. Some standards subject the managerial prerogative to a limited degree of interference and others, by contrast, entail a more acute curtailment of the employer's freedom of autonomy. Such diverse standards have been charted and explored as well as the forces and justifications which have shaped them. It is submitted that when one uncovers the rationales in favour of and against such a hierarchical structure, they are significant for the evolution and our understanding of labour law. They expose the extent to which different employment rights are policed, enabling them to be plotted in terms of a hierarchy of importance. Is it sustainable for the employment relationship to continue to be regulated in a manner in which adjudicators are expected to apply differing standards of review attracting varying intensities of scrutiny of the managerial prerogative, sometimes in the same cases? This paper suggests that this question ought to be answered in the negative. On balance, the disadvantages of a hierarchy of differing standards of review outweigh the merits and a positive case can be made for some limited re-alignment and potentially a wholesale recalibration. The question is whether such a far-reaching agenda of reform ought to be pursued on the basis of policy considerations and/or empirical investigation alone and this is an issue which ought to be addressed at a future point.



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## Footnotes

**1** A formalistic methodology treats labour law as an autonomous discipline which strives towards its own internal intelligibility ‘from inside’ in the mould of the arguments advanced by Ernest Weinrib in E. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) 8–16.

**2** Diver has forged a distinction between rules and standards in terms of the degree of transparency and accessibility of the legal command, C. S. Diver, ‘The Optimal Precision of Administrative Rules’ (1983) 93 *Yale Law Journal* 65, 67 and also L. Kaplow, ‘Rules versus Standards: An Economic Analysis’ (1992–1993) 42 *Duke Law Journal* 557, 561.

**3** M. A. Eisenberg, ‘The Divergence of Standards of Conduct and Standards of Review in Corporate Law’ (1993) 62 *Fordham Law Review* 437; W. T. Allen, J. E. Jacobs, L. B. Strine Jr, ‘Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem’ (2002) 96 *North Western University Law Review* 449.

**4** D. Cabrelli, ‘Rules and Standards in the Workplace: A Perspective from the Field of Labour Law’ (2011) 31 *Legal Studies* (forthcoming).

**5** A functionalist methodology denies the proposition that law or a discrete legal discipline (such as labour law) can be understood as an autonomous body of learning internally by reference to its own sources and claims instead that insights about the law or a particular body of law can only properly be garnered in light of non-legal disciplines such as economics, political theory, moral philosophy, etc., on which see C. McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 *Law Quarterly Review* 632.

**6** That much is clear from the judgment of Elias J in *Heathrow Express Operating Co. Ltd. v Jenkins* [2007] All ER (D) 144 (Feb) at paras 40–1, where the point was made that the selection of an objective standard for the standard of review in the case of the employer’s duty to make reasonable adjustments (ss 3A(2) and 4A(1) of the DDA which is now found in ss 20–2 of the EA 2010) by the Court of Appeal in *Smith v Churchills Stairlifts plc* [2006] IRLR 41, 47 per Kay LJ, was attributable to the fact that the duty enjoins ‘... an employer ... to depart from the usual arrangements in particular circumstances to meet the needs of particular disabled employees’, i.e. that it entails ‘positive discrimination’ which perhaps can be ascribed to the undoubted significance of the fundamental conception of ‘substantive equality’ which underpins that duty.

7 Allen, Jacobs and Strine, 'Realigning the Standard of Review', above n.3.

8 This particular implied term transcends the fact-specific case of discretionary bonuses to cover the employee's remuneration package generally such as the award of share options or annual salary increases, see D. Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (Oxford: OUP, 2005).

9 For a general account of the manner in which implied terms can be applied to radiate behavioural expectations, see L. Barmes, 'Common Law Implied Terms and Behavioural Standards at Work' (2007) 36 ILJ 35.

10 However, the analogy with the judicial control of administrative action should not be taken too far, on which see *Abu Dhabi National Tanker Co. v Product Star Shipping Ltd.* [1993] 1 Lloyd's Rep. 397, 404 per Leggatt LJ.

11 [2000] IRLR 766.

12 [2000] IRLR 766, 774 at [40] per Burton J.

13 *Horkulak v Cantor Fitzgerald International* [2004] IRLR 942 at 950 at [51] per Potter LJ.

14 This approach was approved and applied by Mummery LJ in the case of *Commerzbank AG v Keen* [2007] IRLR 132, 136 at [59], [60].

15 Eisenberg, above n.3, 437, 443.

16 Lord Nicholls in *Malik v BCCI* [1997] IRLR 462 at [14], and per Lord Steyn at [59]–[60].

17 In *Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* [2008] 1 Lloyd's Rep. 558, Rix LJ expressed a particularly strong conceptualisation of the position at [66] where he stated: '... pursuant to ... [a] rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision maker becomes the court itself'.

18 There is no duty imposed upon an employer to treat an employee reasonably, see *Post Office v Roberts* [1980] IRLR 347, *White v Reflecting Roadstuds Ltd* [1991] IRLR 331, *Buckland v Bournemouth University Higher Education Corp* [2010] EWCA Civ 121; [2010] IRLR 445, 448 at [28] per Sedley LJ and *Burton, McEvoy & Webb v Curry* UKEAT/0174/09/SM at [17] per Underhill J. However, see Bogg's penetrating critique in A. Bogg, 'Bournemouth University Higher Education Corporation v Buckland: Re-establishing Orthodoxy at the Expense of Coherence?' (2010) 39 ILJ 408.

19 It could be argued that the test must surely be objective, akin to the behavioural standard applicable in the case of the implied term of mutual trust and confidence, given the similarities between the two implied terms. Indeed, in a number of cases and academic writings, the anti-avoidance term has been treated as a manifestation of the implied term of mutual trust and confidence. But this would be speculation, since it is difficult to isolate any

clear standard of review which must be applied by the adjudicator from the judgments in the relevant cases.

**20** The rationales for the objective test in the case of the implied term of mutual trust and confidence will be considered later in this paper.

**21** A trend explored in detail by Davies in A. Davies, 'Judicial Self-Restraint in Labour Law' (2009) 38 ILJ 278.

**22** This is one way of perceiving what a court or tribunal is doing where it applies an objective test to control discretionary powers. Another way of looking at the same process is to argue that the court or tribunal would be engaged in an exercise of procedural fairness, whereby an express term which confers a discretionary power upon an employer must be exercised in a manner which is consistent with the implied terms of the contract of employment.

**23** *Wilson v Post Office* [2000] IRLR 834, 837 per Buxton LJ and *Abernethy v Mott, Hay & Anderson* [1974] ICR 323, 330-331 per Cairns LJ.

**24** *Farrant v The Woodroffe School* [1998] IRLR 176 and *Ford v Libra Fair Trades Ltd.* [2008] All ER (D) 106.

**25** *Iceland Frozen Foods Ltd. v Jones* [1982] IRLR 439; *Post Office v Foley, HSBC Bank plc (formerly Midland Bank plc) v Madden* [2001] 1 All E.R. 550; [2000] IRLR 827.

**26** *Post Office v Foley* [2000] IRLR 827, 831 at [53] per Mummery LJ, *Morgan v Electrolux Ltd* [1991] IRLR 89 and *London Ambulance Service NHS Trust v Small* [2009] IRLR 563.

**27** *Inchcape Retail Ltd v Symonds* UKEAT/0316/09/DA at [29] per McMullen J QC.

**28** See H. Collins, *Justice in Dismissal* (Oxford: Clarendon Press, 1992) at 97–100 and H. Collins and M. Freedland, 'Finding the Right Direction for the "Industrial Jury": *Hadden v Van den Bergh Foods Ltd/Midland Bank plc v Madden*' (2000) 29 ILJ 288, 294 per H. Collins. To that extent, the argument that the range test excludes subjective considerations is rejected, on which, see A. Freer, 'The Range of Reasonable Responses Test: From Guidelines to Statute' (1998) 27 ILJ 336, 342–3.

**29** *Haddon v Van Den Bergh Foods Ltd* [1999] IRLR 672, 676 per Morrison J.

**30** Collins and Freedland, above n.28; Collins, above n.28, at 8 and 38–9; Freer, above n.28, 335; M. Rubenstein [2000] IRLR 801.

**31** See *Smith and Grady v UK* [1999] IRLR 734, 752.

**32** Or alternatively, as a test which collapses quite easily into such a 'perversity' test.

**33** See the analysis by P. Elias (now Elias LJ) in P. Elias, 'Fairness in Unfair Dismissal: Trends and Tensions' (1981) 10 ILJ 201, 205–6.

- 34** Collins, *Justice in Dismissal*, above n.28 at 39; Freer, above n.28, 335, 340–1.
- 35** So the writer would disagree with Rubenstein and Freer that there is no difference between the two standards.
- 36** The replacement statutory concept is referred to as ‘discrimination arising from disability’ in s 15 of the EA.
- 37** Section 3A(3) of the DDA.
- 38** [2001] IRLR 384.
- 39** [2001] IRLR 384, 388 per Pill LJ.
- 40** See *Collins v Royal National Theatre Board Ltd* [2004] IRLR 395, 398 per Sedley LJ; *Smith v Churchills Stairlifts plc* [2006] IRLR 41, 47 per Kay LJ.
- 41** Sections 15, 20, 21 and 22 of the EqA.
- 42** It is extremely likely that the ‘objective reasonableness’ standard will continue to be applied by the tribunals and courts under ss 20–2 of the EqA.
- 43** *Archibald v Fife Council* [2004] IRLR 651, 655–6 per Lord Rodger and s 3A(6) DDA.
- 44** UKEAT/0497/06/MAA; [2007] All ER (D) 144 (Feb).
- 45** *Ibid.* at [40], [41].
- 46** *Archibald v Fife Council* [2004] ICR 954, 969 at [57] per Baroness Hale.
- 47** J. Davies, ‘A Cuckoo in the Nest? A “Range of Reasonable Responses”, Justification and the Disability Discrimination Act 1995’ (2003) 32 ILJ 164, 183.
- 48** *O’Hanlon v Revenue and Customs Commissioners* [2007] IRLR 404, 418.
- 49** *Jones v Post Office* [2001] IRLR 384.
- 50** See s 15(1)(b) of the EqA.
- 51** [2005] IRLR 726.
- 52** [2005] IRLR 726, 732 at [32] per Pill LJ.
- 53** *Abbey National plc v Fairbrother* [2007] IRLR 320, 325 at [36] per Lady Smith, *Barratt v Accrington and Rossendale College* [2007] All ER (D) 34 (Jan) at [29]–[32] per Lady Smith and *Claridge v Daler Rowney Ltd* [2008] IRLR 672, 675 at [36]–[37] per Elias J (as he then was).

**54** [2010] EWCA Civ 121; [2010] IRLR 445.

**55** [2010] IRLR 445, 448 at [23]–[27]. This was a point decided earlier in *Post Office v Roberts* [1980] IRLR 347.

**56** Collins and Freedland, above n.28.

**57** Allen, Jacobs and Strine, ‘Realigning the Standard of Review’, above n.3, 449, 454–5.

**58** W. T. Allen, J. E. Jacobs and L. B. Strine JR, ‘Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law’ (2001) 26 *Delaware Journal of Corporate Law* 859, 868–9.

**59** S. Anderman, ‘Termination of Employment: Whose Property Rights?’ in C. Barnard, S. Deakin and G. Morris (eds), *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (Oxford: Hart, 2004) 103–4.

**60** P. Elias, ‘Fairness in Unfair Dismissal: Trends and Tensions’ (1981) 10 ILJ 201, 211.

**61** Collins and Freedland, above n.28.

**62** Collins, *Justice in Dismissal*, above n.28 at 97–102.

**63** Ibid., at 98–100. This point is also made by Freer, see Freer, above n.28, 335, 342.

**64** Collins and Freedland, above n.28. Other commentators have argued that the ‘range’ test in this context ought to be replaced by a purely objective standard, on which, see M. Boyle, ‘The Relational Principle of Trust and Confidence’ (2007) OJLS 633, 646.

**65** [2004] IRLR 625.

**66** [2004] IRLR 129, 133 and 134 at paras [26], [27] and [34] per McMullen J.

**67** Application No. 32792/05, [2009] IRLR 139 (ECtHR), 144–5 at paras [44]–[50].

**68** See H. Collins, ‘The Protection of Civil Liberties in the Workplace’ (2006) 69 MLR 619, 630–1; V. Mantouvalou, ‘Human Rights and Unfair Dismissal: Private Acts in Public Spaces’ (2008) 71 MLR 912, 914 and 937; and V. Mantouvalou and H. Collins, ‘Private Life and Dismissal: Pay v UK’ (2009) 38 ILJ 133, 134 and 137–8. See also L. Vickers, ‘Unfair Dismissal and Human Rights’ (2004) 33 ILJ 52.

**69** *Nettleship v Weston* [1971] 2 QB 691, 702 per Denning MR; *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776, 1783D—E per Swanwick J; *Barber v Somerset County Council* [2004] 1 WLR 1089, 1110 per Lord Walker; *Sutherland v Hatton* [2002] IRLR 263, 270 per Hale LJ.

**70** *Malik v BCCI* [1997] IRLR 462, 468 at [59] per Lord Steyn and *RDF Media Group Plc v Clements* [2008] IRLR 207, 218 per Livesey QC.

**71** Formerly ss 3A(2), 4A(1) and 18B of the DDA.

**72** [2004] IRLR 395.

**73** [2006] IRLR 41.

**74** See *Tanner v DT Kean Ltd.* [1978] IRLR 110, 111 per Phillips J, *Alcan Extrusions v Yates* [1996] IRLR 327, 329–30 per Smith J and *Buckland v Bournemouth University Higher Education Corp.* [2010] EWCA Civ 121; [2010] IRLR 445, 448 at [23]–[27] per Sedley LJ.

**75** [2009] IRLR 563.

**76** [2009] IRLR 563, 567 at [44]. Although the objective standards in each of the contexts described above give an adjudicator the power to substitute its own judgment for that of the employer, at a definitional level, some of the employment rights function to naturally constrain the potential for a strong degree of adjudicative intervention. The potential is thus minimised for the tribunals and courts to be levelled with the accusation that their role lacks legitimacy. For example, in the case of the implied duty to exercise reasonable care, the conduct of the employer must be such that it failed to take the requisite steps necessary to discharge the standard of care. In the case of the implied term of mutual trust and confidence, the conduct of the employer must be so severe that trust and confidence has been destroyed or is severely undermined. In both cases, these are high tests despite the objective character of the standard of review.

**77** W. L. Landes and R. A. Posner, *The Economic Structure of Tort Law* (Cambridge, MA: Harvard University Press, 1987) 127. Writer's annotations in square brackets.

**78** [1997] IRLR 462, 464.

**79** [1997] IRLR 462, 469, at [59]. See *Forslind v Bechely-Crundall* 1922 S.C. (H.L.) 173, 179 per Viscount Haldane.

**80** *Johnson v Unisys* [2001] 2 WLR 1076 at 1084 per Lord Steyn; D. Brodie, 'Legal Coherence and the Employment Revolution' (2001) 117 LQR 604; P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford: OUP, 2007) at 17–22. However, one might justifiably cavil that such factors have acted as contributors to the emergence of the term itself as opposed to the standard of review which attaches to the term and determines whether it has been breached.

**81** See the analysis in S. Anderman, 'The Interpretation of Protective Employment Statutes and Contracts of Employment' (2000) 29 ILJ 223, 224.

**82** See ss 13(2), 15(1)(a) and 19(2) of the EqA, formerly s 1(2)(b)(iii) Sex Discrimination Act 1975, s 1(1A)(c) Race Relations Act 1976, reg 3(1)(b)(iii) Employment Equality (Religion or Belief) Regs 2003 (SI 2003/1660), reg 3(1)(b)(iii) Employment Equality (Sexual Orientation) Regs 2003 (SI 2003/1661) and reg. 3(1) Employment Equality (Age) Regs 2006 (SI 2006/1031).

**83** Council Directive No. 2006/54/EC of 5 July 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204/23.

**84** Council Directive No. 2000/43/EC of 29 June 2000, on the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180/22.

**85** Council Directive No. 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation OJ L 303/16.

**86** [1987] IRLR 317, 320 at para 36.

**87** [1993] IRLR 591, on which see A. Baker, 'Proportionality and Employment Discrimination in the UK' (2008) 37 ILJ 305.

**88** *Hardy & Hansons plc v Lax* [2005] IRLR 726, 731–2 at paras 31–2 per Pill LJ held that the proportionality review does not encompass a 'range of proportionate means' standard.

**89** N. Bamforth, M. Malik and C. O'Cinneide, *Discrimination Law: Theory and Context: Text and Materials* (London: Sweet & Maxwell, 2008) 322.

**90** [1999] IRLR 581, 586–7.

**91** P. Craig, 'Unreasonableness and Proportionality in UK Law' in E. Ellis, *The Principle of Proportionality in the Laws of Europe* (Oxford: OUP, 2004) 85–7. But compare this with the contrary view of other commentators, N. Green, 'Proportionality and the Supremacy of Parliament in the UK', in Ellis, *ibid.* at 146 and E. Ellis, 'Proportionality in European Community Sex Discrimination Law' in Ellis, *ibid.* at 180.

**92** *Ibid.*, 100.

**93** Bamforth, Malik and O'Cinneide, above n.89, 115–16 and 329; Ellis, 'The Concept of Proportionality in European Community Sex Discrimination Law', above n.91, 171–80; T. Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in E. Ellis, *The Principle of Proportionality in the Laws of Europe*, above n. 91, 84.

**94** *Nettleship v Weston* [1971] 2 QB 691, 707 per Megaw LJ.

**95** See *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, 567 at paras [40]–[46] per Mummery LJ. However, the interests of the employee will be considered in exceptional circumstances. For example, where the consequences of dismissal for an employer are serious, on which see *Salford NHS Trust v Roldan* [2010] IRLR 721 and *A v B* [2003] IRLR 405.

**96** Tridimas above n.93, 65.

**97** F. G. Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law' in Ellis, *The Principle of Proportionality in the Laws of Europe*, above n.91, 1.

**98** Ibid.

**99** [2007] IRLR 320.

**100** UKEAT/0099/06/RN; [2007] All ER (D) 34 (Jan), paras 29–32 (Lady Smith).

**101** [2008] IRLR 672.

**102** [2010] EWCA Civ 121; [2010] IRLR 445. See A. Bogg, '*Bournemouth University Higher Education Corporation v Buckland*: Re-establishing Orthodoxy at the Expense of Coherence?' (2010) 39 ILJ 408.

**103** Weinrib, above n.1, 13.

**104** N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, (Oxford: OUP, 2005) 190.

**105** H. Collins, *Regulating Contracts* (Oxford: OUP, 1999), 76–9.

**106** P. Davies and M. Freedland, *Towards a Flexible Labour Market*, above n.80, 20–3, 37–9 and 44–5.

**107** D. Cabrelli, 'Discretion, Power and the Rationalisation of Implied Terms' (2007) 36 ILJ 194, 201.

**108** MacCormick, above n.104, 178.

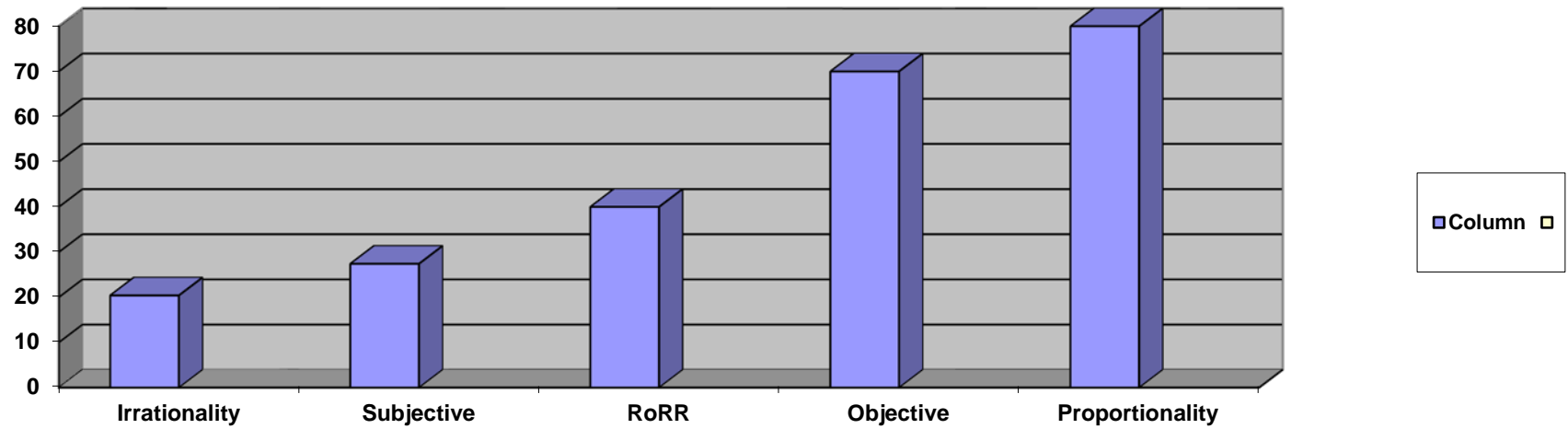
**109** An example of the latter is the assertion in *X v Y* [2004] IRLR 625 and *Pay v Lancashire Probation Service* [2004] IRLR 129, that the range and proportionality tests were more or less the same thing and the subsequent pronouncement of the European Court of Human Rights in *Pay v UK* [2009] IRLR 139 that they were nothing of the sort.



## Tables and Figures

**Figure 1.**

### STRENGTH OF SCRUTINY OF STANDARD



**Table 1.**

<b><u>Standard of Review</u></b>	<b><u>Employment Right(s)</u></b>
Proportionality Test	Right of an employee not to be indirectly discriminated against on the basis of a disproportionate application of a provision, criteria or practice by the employer.
Objective test	<p>(1) Right of an employee to have the employer exercise reasonable care for his physical and psychiatric welfare;</p> <p>(2) Right of an employer not to have trust and confidence in the employment relationship destroyed or seriously undermined without reasonable and proper cause;</p> <p>(3) Right of disabled employee to have employer make reasonable adjustments to physical features of the workplace or provisions, criteria or practices applied by or on behalf of the employer;</p>

	<p>(4) Determination of the existence of a 'dismissal' under section 95(1) of the ERA for the purposes of the employee's statutory right not to be dismissed under section 94 of the ERA; and</p> <p>(5) Assessment of the extent of an employee's contributory fault to his/her unfair dismissal in context of the employee's right not to be unfairly dismissed under section 94 of the ERA.</p>
Range of Reasonable Responses Test	<p>(1) Evaluation of reasonableness of an employee's dismissal under section 98(4) of the ERA for the purposes of the employee's right not to be unfairly dismissed under section 94 of the ERA; and</p> <p>(2) Right of an employee not to be treated less favourably for a reason related to his/her disability.</p>
Subjective Test	<p>Determination of the employer's reason for the employee's dismissal under section 98(1) of the ERA for</p>

	the purposes of the employee's statutory right not to be dismissed under section 94 of the ERA; and
Rationality Test	Right of an employee in the context of the discretionary bonus/benefits implied term.

**Figure 2.**

<b><u>Most Significant</u></b>
Right of an employee not to be indirectly discriminated against on the basis of a disproportionate application of a provision, criteria or practice by the employer.
<p>(1) Right of an employee to have the employer exercise reasonable care for his physical and psychiatric welfare;</p> <p>(2) Right of an employer not to have trust and confidence in the employment relationship destroyed or seriously undermined without reasonable and proper cause;</p> <p>(3) Right of disabled employee to have employer make reasonable adjustments to physical features of the workplace or provisions, criteria or practices applied by or on behalf of the employer;</p>

(4) Determination of the existence of a 'dismissal' under section 95(1) of the ERA for the purposes of the employee's statutory right not to be dismissed under section 94 of the ERA; and

(5) Assessment of the extent of an employee's contributory fault to his/her unfair dismissal in context of the employee's right not to be unfairly dismissed under section 94 of the ERA.

(1) Evaluation of reasonableness of an employee's dismissal under section 98(4) of the ERA for the purposes of the employee's right not to be unfairly dismissed under section 94 of the ERA; and

(2) Right of an employee not to be treated less favourably for a reason related to his/her disability.

Determination of the employer's reason for the employee's dismissal under section 98(1) of the ERA for the purposes of the employee's statutory right not to be dismissed under section 94 of the ERA;

Right of an employee in the context of the discretionary bonus/benefits implied term and the anti-avoidance implied term.

**Least Significant**